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IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

FITZGERALD KLOESS & POPE ADVISORS, LLC,	)	
	)	
Plaintiff,	)	
	)	**Case No. 21-1299-BC**
v.	)	
	)	**JURY DEMAND**
PREMIER PARKING OF TENNESSEE, LLC and PREMIER PARKING MANAGEMENT COMPANY, LLC,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

On May 31, 2022, the Court heard three dispositive motions filed by the parties in this matter. Those motions are: Plaintiff's Rule 12 Motion for Partial Judgment on the Pleadings; Defendants' Rule 12 Motion for Judgment on the Pleadings; and Defendants' Rule 56 Motion for Partial Summary Judgment.[1] The Court has considered the pleadings, the materials submitted by the parties, and the argument of counsel and is now ready to rule.

Background

This is a dispute between parties to a contract for consulting services to be provided by Plaintiff Fitzgerald Kloess & Pope Advisors, LLC ("FKP") to Premier Parking of Tennessee, LLC ("Premier").[2] Those services include business development and marketing for hospital systems, healthcare providers, and group purchasing organizations and assistance in securing healthcare

[1] Defendants' motions were filed as a combination pleading and only docketed as one motion. The Court evaluates them as two separate motions brought pursuant to two separate Tennessee Rules of Civil Procedure.
[2] Defendant Premier Parking Management Company, LLC was added as a party in a February 17, 2022 Amended Complaint. The Court is unclear of its relationship to Premier and both entities are referred to collectively as "Premier" in the Amended Complaint.

parking management and related contracts. FKP's predecessor in interest, Clayton Advisors, LLC, entered the agreement on January 7, 2014, which was assigned to FKP by letter dated September 28, 2016, and approved by Premier on October 12, 2016. FKP and Premier entered a First Amendment to Consulting Agreement effective December 31, 2018 (collectively referred to as the "Contract").

For the purposes of the pending motions, the Contract contains the following relevant terms, with FKP or its predecessor identified as "Consultant" and Premier identified as "Company":

> **3. Compensation.**
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> . . .
>
> **(b) Reports.** Within thirty (30) calendar days of the end of each fiscal quarter, the Company will provide consultant with a written report of the Company's calculation of Net Operating Profits and the Consulting Fee due pursuant to Section 3(a) above for such quarter (the "Quarterly Report"). The Quarterly Report shall also include a list of Customers used in the calculation of Net Operating Profits and the Consulting Fee. If Consultant has not objected to the calculations contained in the Quarterly Report within thirty (30) calendar days from the date of receipt thereof, the Quarterly Report calculation shall be binding and conclusive on the Parties. If Consultant duly gives the Company notice of objection, the Company and Consultant will meet and confer either in person or telephonically to resolve the issues outstanding with respect to the Quarterly Report and the calculation of the Consulting Fee within fourteen (14) calendar days of the Company's receipt of Consultant's objection notice. After fourteen (14) calendar days, if the issues is not resolved, then the Company and Consultant shall submit the issue remaining to an independent, public accountant who does not conduct business with either Company or Consultant.
>
> . . .
>
> **4. Company Obligations.** The Company shall:
>
> . . .
>
> (d) With reference to Parking Management Contracts, furnish to Consultant (i) as soon as practical but in any event within one hundred twenty (120) days after the end of each fiscal year of the Company (x) a statement of income and

of cash flow for such year, all such financial statements reviewed or audited and certified by independent public accountants or regionally recognized standing selected by the Company; (ii) as soon as practical, but in any event within thirty (30) days after the end of each of the first three (3) quarters of each fiscal year of the Company, unaudited statements of income and cash flow for such fiscal quarter for all Parking Management Contracts, all prepared in accordance with U.S. generally accepted accounting principles **("GAAP")** (except that such financial statements may (x) be subject to normal year-end audit adjustments; and (y) not contain all notes thereto that may be required in accordance with GAAP; and (iii) as soon as practical but in any event within thirty (30) days after the end of each fiscal quarter, the Quarterly Report as required by Section 3(b) above.

. . .

8. Audit Rights. During the Term of this Agreement and for a period of one (1) year thereafter and subject to Applicable Laws, Consultant may, at its own expense, inspect and audit the Company's records relating to such Consultant's performance under this Agreement to ensure compliance with the provisions of this Agreement and all Applicable Laws. If a disparity is found pursuant to such audit, and such disparity favors the Consultant, then Consultant shall be reimbursed for the expenses of such audit by the Company.

9. Term.

. . .

D. Put Option.

(i) Notwithstanding the foregoing, at any time after the seventh (7th) anniversary of this Agreement, either party may elect to terminate this Agreement and Company's obligation to pay any further Consulting Fees, and in such event, the Company shall pay to Consultant a one-time "Termination Payment," in an amount equal to as follows:

(a) viewed as of the month end, immediately prior to the election by either party ("Trigger Date"), 4x the TTM Consulting Fees paid to Consultant, applicable to Parking Management Contracts existing as of or prior to the date that is six (6) months prior to the Trigger Date ("Trigger Period"), *plus*

(b) 4x annualized calculation of the Consulting Fees paid or to be paid during the Trigger Period and which were derived from Parking Management Contracts which were entered into during the Trigger Period.

The Termination Payment shall be paid within thirty (30) days of said election and written calculation of the Termination Payment. Upon

payment of the Termination Payment, the provisions of Section 2(b) shall survive the termination of this Agreement for a period of two (2) years and the provisions of Section 7 shall survive the termination of this Agreement.

(ii) Reference is also made to that certain Consulting Agreement, entered into between Premier Parking of Tennessee, LLC and Clayton Advisors, LLC, dated July 26, 2013 ("Consulting Agreement"). The provisions of Section 9.D.(i) shall also be applicable to the Consulting Agreement, upon which if triggered, shall terminate the Consulting Agreement and any further obligations, other than those that expressly survive in the Consulting Agreement or this Agreement.

. . .

11. Regulatory Compliance. The Company and Consultant shall each at all times operate in compliance with all laws. No part of this Agreement is intended to induce, encourage, solicit, compensate for (either directly or indirectly, on either an in-cash or an in-kind basis) or reimburse for referrals for, or the purchase, lease, order, arrangement (or recommending the same) of, any items or services, including any items or services funded in whole or in part by a state or federal health care program. Notwithstanding any unanticipated effect of any provisions of this Agreement, neither party shall intentionally conduct itself in such a manner as to violate the prohibition against illegal remuneration in connection with the Medicare and Medicaid programs set out in 42 U.S.C. § 1320a-7b(b)) and the rules and regulations promulgated thereunder. The parties hereto acknowledge and agree that the services for which the parties have contracted hereunder do not exceed those that are reasonable and necessary for the legitimate business purposes of the arrangement contemplated herein and that the amount paid or payable for such services is a fair market value amount.

. . .

13. Change of Law/Intervening Illegality. The Parties acknowledge that this Agreement is intended to comply with all Applicable Laws. Notwithstanding any provision of this Agreement to the contrary, in the event that any party to it is advised by qualified counsel (**a "Determination"**) that it is more likely than not that any Law in effect or to become effective as of a date certain, or in the event any party receives notice (**"Notice"**) of an actual or threatened decision, finding or action by any governmental or private agency or court (collectively an **"Action"**), which Law or Action, if or when implemented, would have the effect of subjecting either party to civil or criminal prosecution under state and/or federal law or other adverse proceeding because of their participation herein, then the parties shall attempt to amend this agreement to the extent necessary in order to comply with such Law or to avoid the Action, as applicable. If, within ninety (90) days of providing written notice of such Determination or Notice to the other party, the parties, acting in good faith, are unable to agree upon and make amendments or

> alterations to this Agreement to meet the requirements in question or, alternatively, the parties mutually determine that compliance with such requirement is impossible or unfeasible, then this Agreement shall terminate without penalty, charge or continuing liability upon the earlier of: (a) 180 days following the date upon which any party gave written notice to the other or (b) the effective date on which the Law or Action prohibits the relationship of the parties pursuant to this Agreement.

(Am. Compl., Exs. A, C).

The Amended Complaint alleges that the parties' relationship was a successful one and FKP assisted Premier in securing contracts with several large and important customers. (Am. Compl., ¶¶ 21-22). It further asserts that until the first quarter of 2020, FKP had no reason to question the Quarterly Reports Premier issued to it and upon which its payments were based. (*Id.* at ¶¶ 23-24). In January of 2020 FKP did develop suspicions that Premier was manipulating the Quarterly Reports to reduce the payments owed and gives examples of how that likely occurred. (*Id.* at ¶¶ 32-38).

FKP alleged that it exercised its audit rights pursuant to paragraph 8 of the Contract, which audit confirmed its suspicions, and of which Premier executives were aware. (*Id.* at ¶¶ 41-55). Throughout the relationship, FKP asserts that Premier failed to provide the financial statements required by paragraph 4(d) of the Contract. (*Id.* at ¶ 56). FKP objected to Premier's quarterly commission calculations since the first quarter of 2020 and has received no payments since that date. (*Id.* at ¶¶ 57-59). Based on these discoveries, FKP has developed suspicions regarding the accuracy of Premier's Quarterly Reports and resulting commission payments since the inception of the relationship in 2014. (*Id.* at ¶¶ 60-63).

On February 12, 2021, Premier notified FKP that it was terminating the Contract pursuant to the "Put Option" in paragraph 9(D). On April 9, 2021, Premier sent FKP its calculation of the Termination Payment offering to forward same if they were in agreement as to the amount. No such payment was accepted or made. FKP disputes that Premier effectively terminated the

Contract because there is a dispute about the amount owed, based upon the underlying dispute about past payments, and thus Premier has not made the Termination Payment as defined therein. (*Id.* at ¶¶ 65-70).

Standard of Review for Rule 12 Motions

Motions to dismiss pursuant to Rule 12.02(6) are governed by well-established provisions of Tennessee law. The resolution of a motion to dismiss "is determined by an examination of the pleadings alone." *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011). A defendant seeking a motion to dismiss "admits the truth of all of the relevant and material allegations contained in the complaint, but . . . asserts that the allegations fail to state a cause of action." *Id.* (quoting *Freeman Indus., LLC v. Eastman Chem. Co.*, 172 S.W.3d 512, 516 (Tenn. 2005)). Courts considering a motion to dismiss "must construe the complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences." *Id.* (quoting *Trau-Med of Am., Inc. v. AllState Ins. Co.*, 71 S.W.3d 691, 696 (Tenn. 2002)). A motion to dismiss may be granted only "when it appears that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief." *Id.* (quoting *Collum v. McCool*, 432 S.W.3d 829, 832 (Tenn. 2013)).

A motion for judgment on the pleadings is effectively a motion to dismiss for failure to state a claim upon which relief can be granted. *Timmins v. Lindsey*, 310 S.W.3d 834, 838 (Tenn. Ct. App. 2009) (citing *Waldron v. Delffs*, 988 S.W.2d 182, 184 (Tenn. Ct. App. 1998)). "Such a motion admits the truth of all relevant and material averments in the complaint but asserts that such facts cannot constitute a cause of action." *Id.* (citing *Waldron*, 988 S.W.2d at 184). The complaint does not need to contain detailed allegations of all facts giving rise to the claims, but it "must contain sufficient factual allegations to articulate a claim for relief." *Webb*, 346 S.W.3d at

427 (quoting *Abshure v. Methodist Healthcare-Memphis Hosps.*, 325 S.W.3d 98, 103-104 (Tenn. 2010)). "The facts pleaded, and the inferences reasonably drawn from these facts, must raise the pleader's right to relief beyond the speculative level." *Id.* (quoting *Abshure*, 325 S.W.3d at 103-104). Under Rule 12.03, the Court should "deny the motion unless it appears that the plaintiff can prove no set of facts in support of the claim that would entitle him to relief." *Waller v. Bryan*, 16 S.W.3d 770, 773 (Tenn. Ct. App. 1999).

Standard of Review for Rule 56 Motions

Tenn. R. Civ. P. 56.04 sets forth the summary judgment standard, requiring that summary judgment be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Tennessee law interpreting Rule 56 provides that the moving party shall prevail if the non-moving party's evidence is insufficient to establish an essential element of her claim. Tenn. Code Ann. § 20-16-101; *Rye v. Women's Care Center of Memphis, MPLLC*, 477 S.W.3d 235, 261-62 (Tenn. 2015). In response, the non-moving party "'may not rest upon the mere allegations or denials of the adverse party's pleading, but his or her response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.'" *Tolliver v. Tellico Village Property Owners Ass'n, Inc.*, 579 S.W.3d 8, 21 (Tenn. Ct. App. 2019) (citing Tenn. R. Civ. P. 56.06).

In this case, the only facts the parties submit outside of the Amended Complaint are the declarations of their representatives Lawrence H. Kloess III (FKP) and Ryan Hunt (Premier) with attachments, and correspondence regarding Premier's termination notice and related communications.

Legal Analysis of Motions

The Parties' Cross Rule 12 Motions

Premier asserts as an affirmative defense that FKP cannot seek relief pursuant to the Contract because it is unenforceable as against public policy as a matter of law pursuant to the federal anti-kickback statute, 42 U.S.C. § 1320a-7b(b) (the "Act"). FKP seeks a finding from the Court that, based upon the pleadings, the Act is not inconsistent with Tennessee public policy, the Contract does not clearly violate the Act, and Premier is not in the class of persons it is designed to protect and should be equitably estopped from claiming otherwise. Premier asserts that its affirmative defense is valid and that the Court could find, as a matter of law, the Contract invalid pursuant to the Act.

The Court finds this a complex analysis that will require factual findings regarding relevant materials such as cost reports and whether safe harbor provisions of the Act apply. The Court is therefore *not* prepared to find Premier's affirmative defense valid at this time given paragraphs 11 and 13 of the Contract, as set out above. Therein, the parties set out their beliefs and intention that the Contract is not violative of then-existing law and that it is "unanticipated" that it would be found inconsistent with laws and regulations. Paragraph 13 includes an *affirmative duty* on both parties to notify the other if a determination is made that the Contract is illegal. Premier has chosen to do so as an affirmative defense to FKP's action. It remains to be seen whether that failure to previously notify FKP of that determination constitutes a breach, whether that determination is valid, and even if it were, whether that excuses Premier's performance thereunder. Regardless, the application of the Act to the relationship represented by the Contract is more complex than the ability to simply read the pleadings and evaluate the legality thereof. FKP's Rule 12 motion for a judgment on the pleadings to strike Premier's affirmative defense is DENIED.

Premier's Rule 56 Motion for Partial Summary Judgment

With this motion, Premier seeks relief from the Court on three issues: (i) the Court dismiss FKP's claims to the extent they include quarters after which FKP did not lodge an objection within thirty (30) days, relying on what it asserts is the clear language of 3(b); (ii) the Court find objections made after the first quarter of 2020 going forward be referred for "mandatory resolution" through the clear language in 3(b); and (iii) the Court declare that the Contract is terminated pursuant to 9(D).

Relevant Time Period

The Contract contains several provisions related to the parties' rights and responsibilities associated with the quarterly commission payments, review and provision of financial records related to those calculations.

Paragraph 3(b) required Premier to provide FKP with Quarterly Reports including calculations of the consulting fee due, which report must include a list of customers included in the calculations. FKP has a limited period to review the calculations and voice an objection, if there is one; otherwise, it would be "binding and conclusive on the Parties."

Paragraph 4(d) required Premier to provided FKP extensive financial reports an on annual basis, including a statement of income and of cash flow.

Paragraph 8 allows FKP an ongoing audit right of Premier's financials through the life of the Contract and for one year thereafter.

The 2019 Tennessee Supreme Court decision in *Individual Healthcare Specialists, Inc. v. BlueCross BlueShield of Tennessee, Inc.* provides one of the most current and thorough recitations of Tennessee law regarding contract interpretation. *Individual Healthcare Specialists, Inc. v. BlueCross BlueShield of Tennessee, Inc.*, 566 S.W.3d 671 (Tenn. 2019). The "foundational

principles in all of Tennessee contract law" are "that courts must interpret contracts so as to ascertain and give effect to the intent of the contracting parties consistent with legal principles." *Id.* at 688 (citations omitted). Another is that a court must have as its "sole object 'to do justice between the parties, by enforcing a performance of their agreement according to the sense in which they mutually understood it at the time it was made.'" *Id.* (citing *McNairy v. Thompson*, 33 Tenn. 141, 149 (1853)). After an analysis of contract interpretation cases over years, the Court came back to the principle that Tennessee caselaw "demonstrates resolve to keep the written words as the lodestar of contract interpretation" and that courts not be "a fallback mechanisms for parties to use to 'make a new contract' if their written contract purportedly fails to serve their 'true' intentions." *Id*. at 694 (citing *Planters Gin Co. v. Fed. Compress & Warehouse Co.*, 78 S.W.3d 885, 889-90 (Tenn. 2002); *Petty v. Sloan* 277 S.W.2d 355, 359 (Tenn. 1955)).

> In short, Tennessee cases cite both textualist and contextualist principles; consideration of context evidence does not eclipse other canons of contract interpretation but rather cooperates with them. Thus, as in other states, Tennessee's jurisprudence on contract interpretation 'evades tidy classification as textualist or contextualist.'

Id. (citing Lawrence A. Cunningham, *Contract Interpretation 2.0: Not Winner-Take-All but Best-Tool-for-the-Job*, 85 Geo. Wash. L. Rev. 1625, 1627 (Nov. 2017)).

As further set out in *Individual Healthcare Specialists, Inc.*, in fully integrated contracts such at the one in this case, "general extrinsic evidence of context may be used to interpret the contractual language in line with the parties' intent, but the parol evidence rule prohibits the use of evidence of pre-contract negotiations in order to vary, contradict, or supplement the contractual terms." *Id*. at 697.

Both parties have submitted sworn representative statements setting out conflicting interpretations of paragraph 3(b) and whether the inclusion of the term "calculations" meant FKP's

only obligation was to check Premier's math in the relevant 30-day period. FKP is a successor in interest to the Contract; thus, its representative cannot testify to the intention of its predecessor, Clayton Advisors, LLC, in agreeing to this provision. FKP's representative does testify to its intentions and actions since 2016, as does Premier's representative. The Court finds, based upon these conflicting statements, the lack of clarity in 3(b) regarding the meaning and extent of the 30-day period, and the Contract's inclusion of other rights and obligations related to providing financial information and audit rights, that it cannot grant summary judgment on this issue. The Court does not find the relevant terms to be unambiguous such that it can determine, without more, the parties' intent.

Alternative Dispute Resolution

Premier asserts that the Contract language in 3(b) also requires disputes regarding the Quarterly Reports to be referred to an independent, public accountant as a form of alternative dispute resolution. The Court is requested to mandate such a referral regarding the dispute from 2020 forward (based upon its position that any dispute of prior quarters is time barred) for resolution in this manner and hold in abeyance further proceedings on those issues. Premier argues that for an alternative dispute resolution mechanism to be enforceable, it does not have to include "magic words" such as arbitration if the provision is sufficiently definite for enforcement. While the Court agrees with that general legal principle, it does not find the language in 3(b) to be sufficiently definite to demonstrate an intention for binding, mandatory alternative dispute resolution, particularly given the lack of clarity regarding what disputes are included in the provision, as discussed above. The Court therefore denies Premier summary judgment as to this issue.

Status of Parties' Relationship

The third request for relief in Premier's Rule 56 motion is for a finding that it effectively terminated the Contract pursuant to 9(D), despite the ongoing dispute regarding the calculation of the Termination Payment. The Court does find Premier is entitled to summary judgment on this issue because it clearly evidences the parties' intention that either be able to terminate after seven (7) years.

9(D)(i) states "either party may elect to terminate this Agreement and Company's obligation to pay any further Consulting Fees, **and in such event**, the Company shall pay to Consultant a one-time "Termination Payment[.]" (Emphasis added). 9(D)(i)(a) and (b) set out how the Termination Payment is to be calculated and that it "shall be paid within thirty (30) days of said election and written calculation of the Termination Payment." It is undisputed that Premier contacted FKP with its calculation of the Termination Payment, which calculation is in dispute. FKP asserts that the inclusion of the language "Upon payment of the Termination Payment, the provisions of Section 2(b) shall survive the termination of this Agreement for a period of two (2) years and the provisions of Section 7 shall survive the termination of this Agreement" at the end of this provision modifies the earlier language to condition termination upon payment of the Termination Payment. The Court disagrees and finds that Premier effected termination with its February 12, 2021 letter. The failure to make the Termination Payment does not change the effect of the termination notice or provide FKP the right to hold Premier hostage to the Contract by refusing to accept its calculation of same. The Court therefore grants Premier's motion for summary judgment with a finding that the Contract was terminated with the February 12, 2021 letter pursuant to 9(D).

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that the parties' Rule 12 motions for judgment on the pleadings are DENIED.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Premier's Rule 56 motion for summary judgment is GRANTED IN PART. The Court GRANTS summary judgment to Premier by finding that it terminated the Contract with its February 12, 2021 notice. All other relief Premier seeks in its summary judgment motion is DENIED.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the deadlines set out in the parties' March 21, 2022 Joint Proposed Case Litigation Plan, as adopted in the Court's March 21, 2022 Order, and specifically items numbered 4-11, REMAIN. Items 12-14 regard pre-trial and trial dates. The parties are ORDERED to contact the Calendar Clerk to obtain these dates and submit a proposed order setting this case for a twelve-person jury with an associated pre-trial conference.

It is so ORDERED.

s/Anne C. Martin

ANNE C. MARTIN
CHANCELLOR
BUSINESS COURT DOCKET
PILOT PROJECT

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